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MODERN UNIVERSAL SDN BHD

v.

MSIG INSURANCE (MALAYSIA) BHD

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HIGH COURT MALAYA, SHAH ALAM
PRASAD SANDOSHAM ABRAHAM J
[CIVIL SUIT NO: 22NCVC-580-05-2012]
5 FEBRUARY 2014

C ***INSURANCE:*** *Fire insurance - Claim on policy - Arson - Whether insured involved in arson - Whether proved - Repudiation of liability - Whether insurer justified in repudiating liability - Whether insured acted in good faith - Whether insured acted in breach of condition of policy - Whether insured's claim grossly exaggerated*

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The plaintiff procured an All Risk Policy ('the policy') from the defendant insurance company. *Vide* the policy, all the goods in the plaintiff's premises ('the insured goods') were insured for a sum of RM1,403,618 against all risk including the peril of fire. During the subsistence of the policy, a fire broke out at the plaintiff's premises damaging all the insured goods and causing the plaintiff to suffer loss in the sum of RM2,134,227.62. The plaintiff made a claim against the defendant for the sum of RM1,403,618, being the sum insured under the policy. However, the defendant repudiated the plaintiff's claim under the policy. The plaintiff filed the present suit wherein it claimed the sum of RM1,403,618 under the policy and such other relief. The defendant raised several grounds to justify repudiation of liability, and contended, *inter alia*, that (i) the business for which the plaintiff sought insurance cover was illegal; (ii) the plaintiff had failed to disclose all the material relevant facts and thereby committed a breach of the doctrine of *uberrimae fidei*; and (iii) the fire was caused by the plaintiff or its agents. The defendant contended that the insured goods were set on fire and destroyed on purpose in breach of the terms of the policy. The plaintiff, however, disputed the defendant's allegation that it was operating an illegal business and rebutted the allegation of arson. Instead, the plaintiff argued that the burden of proof to establish arson was proof beyond a reasonable doubt.

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Held (dismissing plaintiff's claim with costs):

(1) Under the relevant laws of the relevant local authorities, the plaintiff was required to obtain a licence to run its business. However, the plaintiff had stopped operating the business whilst carrying out renovation work on its premises. In preparation for the eventuality of obtaining the necessary licences, the plaintiff had taken out the policy. As such, the policy was not tainted with illegality and the maxim '*ex turpi causa non oritur actio*' was not applicable to this case. (paras 4 & 5)

(2) When an insurer pleads that an insured had committed an act of arson, by deliberately setting fire to the insured property, the standard of proof on the insurer, whilst higher than a civil standard of proof, does not however, require proof beyond reasonable doubt. On the facts, the expert reports tendered by the defendant, which were not rebutted by the plaintiff, and surrounding circumstances, entitled the defendant to repudiate liability under the policy. (paras 19 & 21)

(3) Condition 10 of the policy, which provides, *inter alia*, that any claim under the policy made in reliance of misstatements or fraudulent documents became void, was a condition precedent to any liability of the defendant under the policy. Based on surrounding circumstances such as the plaintiff's financial ill health and delay in obtaining the licence to run its business, the defendant had successfully proven the plaintiff's breach of Condition 10 and this automatically entitled the defendant to repudiate liability under the policy. (paras 8, 24 & 32)

(4) The plaintiff's involvement in the setting up of the fire was not without foundation when taken together with the compelling circumstantial evidence. Fraudulent means or devices had been used by the plaintiff to obtain benefit under the policy and the defendant was thus entitled to repudiate its liability under the policy. As for the fire-consequential loss policy, the claim was grossly exaggerated thereby disentitling the plaintiff from claiming indemnity under the policy. A contract of insurance was based on utmost good faith and the plaintiff's failure to act in good faith meant that the defendant as the innocent party was entitled to be discharged from its obligations under the contract. (paras 28 & 29)

(5) The documentary evidence showed that the plaintiff had exaggerated its claim. When a claimant inflates the amount of its claim, there is a *prima facie* presumption that he is not acting in good faith. As the plaintiff had failed to rebut this presumption, this showed that it was not acting in good faith and its claim should be dismissed. (para 29)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Asia Insurance Co Ltd v. American International Assurance Co Ltd [1953] 1 LNS 4 HC ***(refd)***

Baghbadrani v. Commercial Union Assurance Co Plc [2000] Lloyd's Rep IR 94 ***(refd)***

Brighton Industries (M) Sdn Bhd v. Supreme-QBE Insurance Bhd [1992] 3 CLJ 1424; [1992] 2 CLJ (Rep) 206 HC ***(refd)***

Britton v. The Royal Insurance Company (1866) 4 F&F 905 ***(refd)***

Broughton Park Textiles (Salford) Ltd v. Commercial Union Assurance Co Ltd [1987] Vol. 1 Lloyd's Rep 194 ***(refd)***

Castellain v. Preston [1883] 11 QBD 380 ***(refd)***

Euro-Diam Ltd v. Bathurst [1987] 1 Lloyd's Rep 178 ***(refd)***

Hardy v. Motor Insurers Bureau [1964] 2 QB 745 ***(refd)***

Insurance Corporation of the Channel Islands Ltd v. McHugh and Royal Hotel Ltd [1997] LRLR 94 ***(refd)***

Metro Gain Sdn Bhd v. Commerce Assurance Berhad [2011] 1 LNS 1403 HC ***(refd)***

N Krishna Moorthy SA Navaratnam & Anor v. Oriental Capital Assurance Bhd & Another Case [2010] 3 CLJ 104 HC ***(refd)***

Nilai-3 Porcelain Inn Sdn Bhd v. Berjaya Sompo Insurance Bhd [2012] 1 LNS 1014 HC ***(refd)***

Nsubuga v. Commercial Union Assurance Co Plc [1998] 2 Lloyd's Rep 682 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

William Dawnees Ltd v. Legal & General Assurance [1981] 1 Lloyd's Rep 674 ***(refd)***

Wool Colt v. Excess Insurance Co Ltd and Miles Smith Anakison & Go & Ltd (No 2) [1979] 2 Lloyd's 210 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 17

Fire Services Act 1988, ss. 46, 47

Insurance Act 1996, s. 150(1)

Other source(s) referred to:
Poh Chu Chai, *Law of Insurance*, 6th edn, pp 732, 910, 911

For the plaintiff - Colin Liew (KC Fee with him); M/s KF Ee & Co
For the defendant - Tunku Farik Tunku Ismail (Young Hiang Siong with him); M/s Azim, Tunku Farik & Wong

Reported by Vani Krishnan

JUDGMENT

Prasad Sandosham Abraham J:

[1] This matter was heard over a period of time and after the conclusion of the trial, the court adjourned the matter for decision pending the filing of written submissions by respective counsel and thereafter judgment was delivered on 9 December 2013, wherein I dismissed the plaintiff's claim with costs. I append below my grounds of judgment. A summary of the plaintiff's case is set out as follows extracted from the plaintiff's submission:

(a) This is the plaintiff's insurance claim against the defendant in respect of losses/damage on the plaintiff's goods caused by fire, which broke out in their premises on 10 June 2007 covered under a certain insurance policy;

(b) The plaintiff is a private limited company with premises at No. 21, 23 & 25, Jalan SP 2/4, Taman Serdang Perdana, Section 2, Seri Kembangan, 43300 Selangor Darul Ehsan ("the said premises');

(c) The defendant is a licensed insurer under the Insurance Act 1996 (formerly known as Hong Leong Assurance Bhd ("HLA");

(d) Prior to the procuring of an insurance policy from the defendant, the plaintiff was carrying on the business of running a hotel, nightclub disco, karaoke and spa known as the 'Prince Inn';

(e) On or about October 2006, the plaintiff was no longer operating any business in the premises whilst awaiting for the relevant licence from authorities before intending to resume their business;

A (f) The plaintiff then entered into a contract of insurance with the defendant (formerly known as 'Hong Leong Assurance Bhd') *vide* an all risk policy No: 0600053-01-3 is sued on 13 February 2007 ("the policy"), insuring the goods in the premises, to wit, office equipment, kitchen equipment, signage, computers
B and printers, walkie-talkies, electrical appliances, fixtures & fittings, air conditioners, karaoke system, DVVR system and sound system (hereinafter collectively to be known as 'the insured goods') against *inter alia*, all risk including the peril of fire;

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(g) The policy was purchased by the plaintiff from the defendant for a premium of RM51,592.96 covering the period between 2 February 2007 to 1 February 2008. The sum insured for the insured goods under the policy was for a sum of RM1,403,618;

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(h) On 10 June 2007, during the subsistence of the policy, a fire broke out at the premises, which caused the damage of all the insured goods and resulted in the plaintiff incurring and suffering extensive loss and damage in the sum of RM2,134,227.62;

E (i) Although the plaintiff suffered a loss of RM2,134,227.62 but the plaintiff made a claim against the defendant for the sum of RM1,403,618 the sum insured under the policy, being the loss and damage suffered by the plaintiff as a result of the fire;

F (j) On or about 12 February 2008 the defendant, acting through its former solicitor's letter ie, M/s Othman Hashim & Co wrongfully repudiated the plaintiff's claim under the policy;

(k) Wherefore the plaintiff claims the sum of RM1,403,618 under the policy being loss and damage suffered as a result of the
G fire at the premises and other prayers as per the plaintiff's amended statement of claim.

[2] The defendant in turn has repudiated its liability under the said insurance policy on various grounds, which will be dealt with
H in detail later. The relevant issues raised by the plaintiff are set out in its issues to be tried:

(a) Whether the defendant has proved the defence of arson by the plaintiff;

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(b) Whether the defendant was in breach of the Term Requiring Burglary Alarm and CCTV (closed circuit television) to be installed.

[3] A contract of insurance is essentially a contract of indemnity in Insurance Law, an oft' quoted principle in Insurance Law. This principle not only ensures that the insured is indemnified for his loss, but it also applies to cover a situation where the insured does not make a profit from his loss. The court refers to the case of *Castellain v. Preston* [1883] 11 QBD 380 and to the judgment of LJ Brett found at p. 386 of the report which supports this statement of the law. The onus is on the insurance company ie, the defendant to justify the repudiation of the plaintiff's claim under the policy. The defendant have raised several grounds to justify repudiation of liability, and the court would deal with each in turn:

(a) Illegal business carried out by plaintiff invalidates the all risks policy - *ex turpi causa non oritur actio*.

(b) The policy is null and void for misrepresentation and/or non-disclosure of material facts and/or breach of Condition 10 of the all risks policy and/or breach of s. 150(1) of the Insurance Act 1996 and/or breach of a contract of *uberrimae fidei* ("good faith");

(c) Fraudulent claim/breach of Condition 4(c) and 10 of the all risks policy;

(d) Fire loss was occasioned by the plaintiff's/its agents' wilful act or its/its agents' connivance;

(e) Breach of clause MS0003 - Alarm maintenance clause.

[4] The plaintiff in its declaration and application for insurance cover from the defendant, had failed to disclose that despite representing that the plaintiff was in the business of running a hotel, night club and karaoke lounge, disco and spa business, however the plaintiff did not have the necessary licences to do so, a fact admitted by the plaintiff. The defendant therefore contends the business for which the plaintiff seeks insurance cover is illegal (see exh. D11) and therefore the plaintiff has run afoul of condition 4(c) of the said policy. Let us look at the said policy and its relevant clauses. As stated earlier the said policy is an "All

risk policy" (see pp. 1 to 9 of Bundle B NB Clause 4(c). I have considered the authorities referred to the court by the defendant in particular *Hardy v. Motor Insurers Bureau* [1964] 2 QB 745 at p. 762 and *Asia Insurance Co Ltd v. American International Assurance Co Ltd* [1953] 1 LNS 4; [1953] 19 MLJ p. 87. I also refer to the case of *Euro-Diam Ltd v. Bathurst* [1987] Vol. 1 Lloyd's Rep p. 178 where His Lordship Staughton J decided and I quote:

> (4) The contract of insurance was not illegal; neither the making of the contract nor the performance of it by the payment of premium and claims was illegal by English law; Euro-Diam did not need to plead, or prove or show any of the illegal acts which had been committed and their claim did not represent the proceeds of crime at all directly immediately or proximately and Euro-Diam's title was not affected by illegality; their claim was not tainted by illegality (see p. 187, col 1; p. 190, cols 1 and 2).

(See also Poh Chu Chai *Law of Insurance* 6th edn. pp. 732-735).

In the present case, the evidence clearly shows that the plaintiff had stopped operating the business from October 2006, whilst carrying out renovation work in preparation for the issue of the licence. There was a survey of the plaintiff activities done by one Avery Lee of the defendant (Bundle B p. 36) and his testimony would have borne that out but alas he was not called as a witness. The plaintiff was raising the operation of its business to justify its claim and therefore the issue of the policy being tainted with illegality does not arise. The running of the said business by the plaintiff or the intended running of the said business by the plaintiff was not illegal. Under the relevant laws of the relevant local authorities, the plaintiff was required to obtain a licence to run the said business. Whilst in the process of obtaining the licences, the plaintiff did not carry out the said business. In preparation for the eventuality of obtaining the said licences the plaintiff took out the said policy. To my mind the policy is not tainted with illegality. I refer to the judgment of Diplock LJ in *Hardy v. Motor Insurance Bureau* [1964] 2 QB 745 particularly at pp. 767-768 and I quote:

> The rule of law on which the major premise is based, *ex turpi* causa non *oritur actio*, is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce

> a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing enforce that right.

[5] I would therefore rule the maxim "*ex turpi causa non oritur actio*" is not applicable in our case.

[6] The second ground raised by the defendant to repudiate the policy is that the plaintiff did not disclose the fact that they did not possess a licence to operate the said business, and this amounts to a breach of condition 10 of the policy and further is in breach of the doctrine of '*uberrimae fides*' (good faith). This would entitle the defendant to repudiate the policy.

[7] The second ground raised by the defendant to repudiate the said insurance policy appearing on pp. 1-18 of Bundle B. The defendant argues the fact the plaintiff did not possess a licence to operate a "disco/karaoke/spa/inn operator" and the non disclosure of the same is a breach of the duty of good faith and would entitle the defendant to repudiate the policy and I again turn to condition 10 (p. 8 of Bundle B) which I now set out.

> **10. Fraud**
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> If the proposal or declaration of the Insured is untrue in any respect, or if any material fact affecting the risk be incorrectly stated therein or omitted there from, or if this Insurance or any renewal thereof shall have been obtained through any misstatement, misrepresentation or suppression, or if any claim made shall be fraudulent or exaggerated, or if any false declaration or statement shall be made in support thereof, then, in any of these cases, this Policy shall be void.

[8] The defendant contends that since that the plaintiff did not disclose this fact to the defendant, the plaintiff had run afoul of condition 10 of the said insurance policy and the claim of plaintiff is therefore void and the defendant is entitled to repudiate its liability under the said policy. The defendant contends that failure to disclose all the material relevant facts, in this case, the business of the plaintiff not being licensed, was a breach of the age-old adage ie, a breach of the doctrine of "*uberrimae fidei*" ie, good faith which enables the defendant to repudiate liability under the said policy. The plaintiff argues that the defendant was appraised

of this fact through its agent DW6, and further the defendant through one of its employee's Mr Avery Lee went to the plaintiff's premises to conduct a compliance survey in December 2006, at a time when the plaintiff was not operating its business. (See p. 36 encl. B), Mr Avery Lee would have been aware of this fact. So I would hold as a fact, the defendant was aware that the plaintiff was not operating its business whilst waiting for the relevant license to be issued by the appropriate authorities and the abovenamed were under a duty to inform the defendant.

[9] Reference is drawn to the case of *Woolcott v. Excess Insurance Co Ltd and Miles, Smith Anderson & Game & Ltd (No 2)* [1979] 2 Lloyd's Rep at p. 210 where it was held by J Cantley in holding 3 & 4 and I quote:

> 3. On these facts the Plaintiff had no duty to disclose his past to the third party brokers;
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> 4. the Defendants were not entitled to avoid the policy but were entitled to be indemnified by the brokers since the brokers were under a duty to disclose their knowledge of the Plaintiff's criminal past to the Defendants.

[10] Although the focus of the trial was on wilful arson as raised by the defendant and denied by the plaintiff, the court is concerned with condition 10 of the policy. The following portion highlighted ie, 'or/if any claim shall be fraudulent or exaggerated or if false declaration or statement shall be made in support thereof'. Wilful arson is one of the grounds that could come under condition 10. However, here the court looks at the claim of the plaintiff and whether the claim is tainted with falsity and or is fraudulent. Since the court is dealing with the breach of the policy, the question of whether there was arson is by the by, the burden of proof on the defendant is lower than required to proof wilful arson and would be a civil burden of proof ie, balance of probabilities. See *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182. The defence here is a separate defence from that of wilful arson in that the law looks at the justice of the case and sound policy and that principle would apply to a claimant profiting from the occurrence of the fire. I also refer to para. 8 of statement of defence at p. 29 of Bundle A, where the breach of condition 4(c) & 10 of the policy is pleaded.

[11] I refer to the case of *Britton v. The Royal Insurance Company* 4 F&F 905 and to the judgment of Willes J and the relevant portions of His Lordship's judgment which I now quote and I adopt the reasoning therein: A

> Willes, J. however, in summing up the case to the jury, pointed out that this was not so, and explained his view of the case thus, - A fire insurance, he said, is a contract of indemnity; that is, it is a contract to indemnify the assured against the consequences of a fire, provided it is not willful. Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even supposing it were not willful, yet as it is a contract [909] of indemnity only, that is, a contract to recoup the insured the value of the property destroyed by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and loss, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of willful arson. It gives the go-bye to the origin of the fire, and it amounts to this - that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be most dangerous to permit parties to practice such frauds and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is willful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy. This, therefore, was an independent defence; quite distinct from that of arson, and not at all mixed up with it; and it was to this defence, of fraud, he invited the jury to give their attention. The circumstances of the three fires, he said, might be material with reference to the question of fraud. There were certainly strong circumstances of suspicion. The fact that the Plaintiff should have had three fires within two or three years - one in August, 1864.

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[12] In dealing with a breach of condition 10 of the policy, despite the fact there are references to a fraudulent claim in condition 10 the burden of proof is on the defendant who alleges as in this case that there has been a breach of condition 10 and as I find it is a civil fraud the onus is on a balance of probability as the allegation is one of a breach of a particular term of the policy. I refer to the decision of the Federal Court in *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45 where it was held:

> (3) Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceeding cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the civil standard was applicable.

and to the illuminating judgment of Mohd Azmi FCJ, where His Lordship clearly and concisely has set out the applicable law and I quote:

> From the wide definition of 'fraud' under s. 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v. Paw Ngi Siu*, the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no

longer good law. But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud - and not based on a criminal conduct or offence - the civil burden is applicable.

From all the authorities cited before this court, it seems clear that fraud can be civil or criminal in any civil proceedings. Hence Osborne's *Concise Law Dictionary* (8th edn.) at p. 152 defines fraud as follows:

> The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury, the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence, the *mens rea* of which has been defined as 'to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled', per Lord Diplock in *R v. Scott* [1975] AC 814. Certain other frauds are likewise criminal offences, eg, under the Prevention of Fraud (Investments) Act 1958.

Indeed, our s. 17 of the Contracts Act 1950 recognizes the various shades of fraud by defining it as follows:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
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> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
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> (b) the active concealment of a fact by one having knowledge of belief of the fact;
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> (c) a promise made without any intention of performing it;
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> (d) any other act fitted to deceive; and
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> (e) any such act or omission as the law specially declares to be fraudulent. Explanation - Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

A The definition of 'fraud', read in conjunction with the authorities, leads us to the conclusion that where the fraud alleged in civil proceedings is based on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

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The particulars of fraud pleaded by the respondent in this appeal fall under s. 17 read with 'misrepresentation' under s. 18. 'Misrepresentation' is defined to include:

C (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone D claiming under him by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

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In this case, the sharp practice perpetrated by the appellant on the deceased did not amount to a criminal offence. Although the late Mr Chan might have known that he was signing an option agreement, we are satisfied that both parties knew all along that the document was merely intended to be used not for actual sale F to the appellant but for the purpose of enabling him to test the property market. This explains why the sale price of RM80,000 was never fixed in accordance with cl. 11 of the lease agreement. The fraudulent act complained of was not only in the procurement of the option agreement, but also in using the document for a G purpose in breach of cl. 11. Since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the learned judge did not err in law in applying the civil burden of proof. In any event, for reasons already advanced, the remedy of specific performance ought not to be granted in the circumstances of this case and as such the decision H of the learned judge in refusing to grant the remedy must be upheld.

[13] I would observe that the fraud arises out of the allegation of the plaintiff that the plaintiff's property was destroyed in a fire I for which the plaintiff says it's not responsible so payment has to be made under the said policy. The defendant refused to pay because the defendant contends that this was a fraudulent

misrepresentation as the property was set on fire and destroyed on purpose in breach of condition 10 & 4(c) of the said policy. Further, in respect of the items insured, there was elements of exaggeration in the plaintiff's claim. I would therefore hold, this is a case of civil fraud and not criminal fraud ie, on a balance of high probabilities. In dealing with the issue of fraudulent misrepresentation, s. 17 of the Contracts Act 1950 will have to be considered.

[14] It is to be noted that the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 made no reference to the aforesaid decision of the Federal Court and in fact in para. 12 of the leading judgment of Nik Hashim FCJ says and I quote:

> [12] It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities (see *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 FC). Thus, it is rather perplexing on the part of Court of Appeal to come to a finding that the available circumstantial evidence satisfies both the standards like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal is surprising, and not only reflects a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct.

[15] The Federal Court's decision in *Ang Hiok Seng* (*supra*) was not referred to by His Lordship in his judgment.

[16] I now turn to the pivot of the defendant's defence to repudiate the plaintiff's claim. The defendant argues that the claim is fraudulent as the defendant allege the fire that destroyed the plaintiff's property was caused by the plaintiff and or through the connivance of the plaintiff through its servants agents or otherwise. The plaintiff deny this.

[17] The plaintiff to support its claim and rebut the allegation of arson forceably argued that the burden of proof to establish arson is proof beyond a reasonable doubt. This has been established by the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; [2007] 2 MLJ 301 where it was held (2) & (3) (MLJ):

(2) The respondent charged that arson on instigation by Balasingham was the cause of the fire and thus it was incumbent for the respondent to prove circumstances which excluded any other explanation. In this case, however, the respondent had failed to do so. It must be noted that even the respondent's own witnesses (DW20, DW25 and DW34) admitted that 'spontaneous combustion' could not be ruled out. So, where the evidence leaves it open whether the loss was caused by accidental fire (spontaneous combustion) or arson, the appellant being the assured must recover since the presumption against crime operates in its favour (see para. 14).

(3) The standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 followed. Thus, it was rather perplexed on the part of Court of Appeal to come to a finding that the available circumstantial evidence satisfied both the standards, like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal was surprising, not only reflected a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct (see para. 16).

[18] This suggest a very high standard proof and all a plaintiff has to show that if at all there is any other explanation as to how the fire could have been caused other than by the plaintiff, the respondent would fail in its defence. This case on the face of it departs from a long line of authorities both in this country and the Commonwealth that maintain in essence, as long as it was highly probable the fire was caused by arson it would suffice. I need only refer to *Brighton Industries (M) Sdn Bhd v. Supreme-QBE Insurance Bhd* [1992] 3 CLJ 1424; [1992] 2 CLJ (Rep) 206 where his Lordship LC Vohrah J (as he then was) held:

[1] Where serious allegations are made that is with regards to the wilful misconduct on the part of the plaintiff, a very high degree of probability within the general standard has to be applied.

[2] The defendant had to conform to this strict test in order to establish that the fire was caused by the plaintiff's wilful act or with its connivance.

[3] Based on the facts, the defendant had established a high degree of probability that the fire at the factory was set wilfully or with the connivance of the plaintiff.

[19] When an insurer pleads that an insured has committed an act of arson, by deliberately setting fire to the said property the standard of proof on the defendant whilst higher than a civil standard of proof, it did not however require proof beyond reasonable doubt. In *William Dawnees Ltd v. Legal & General Assurance* [1981] 1 Lloyd's Report 674 Neill J held the evidential burden in the case of arson was to show on a high degree of probability that the fire was caused by the insured and not beyond reasonable doubt.

[20] The plaintiff in its submissions contends the following factors clearly negate the defendant having proved beyond a reasonable doubt that the fire was caused by arson ie, deliberately by the plaintiff.

(a) No eye witnesses as to how the fire was started, thus labelling the defendant' evidence as mere conjecture and speculation.

(b) No criminal prosecution has been initiated in respect of the fire despite a police report being lodged (p. 394 of Bundle B). The police were not called to give evidence in respect of these investigations. The fire report of the fire department was also inconclusive (see p. 40 of encl. B).

(c) DW1 and DW2 expertise as fire investigators was put into question.

(d) Samples take by PW1 were taken without the knowledge and consent of the plaintiff and or its representative.

(e) The claim of custody of the samples may have been broken.

(f) The inflammable and combustible materials on the premises in question may have caused the fire through reasons other than arson.

(g) There is no evidence to link the plaintiff to the alleged arson.

(h) The evidence from the site contravenes ss. 46/47 of Fire Service Act 1988 and was tainted with illegality and its credibility should be viewed with suspicion.

A (i) The presence of toluene and xylene as well as kerosene does not suggest beyond reasonable doubt that the plaintiff had committed arson. (See *Nilai-3 Porcelain Inn Sdn Bhd v. Berjaya Sompo Insurance Bhd* [2012] 1 LNS 1014; [2013] 9 MLJ 256).

B (j) Since no action has been taken by the police to prosecute the plaintiff that was *prima facie* evidence that the allegation of arson by the defendant had not been made out (see *N Krishna Moorthy SA Navaratnam & Anor v. Oriental Capital Assurance Bhd & Another Case* [2010] 3 CLJ 104.

C **[21]** I note the defendant's basis to repudiate liability lies in the breach of condition 10 of the said insurance policy. It is also to be noted that the plaintiff did not produce their own expert report to rebut that of the defendant. From the facts it appears here looking at all the circumstances of the case, the expert D reports and surrounding circumstances I hold the defendant is entitled to repudiate liability under the said policy. I find that there is a high probability that the fire was caused and/or attributed to the plaintiff. I also refer to the case of *Broughton Park Textiles (Salford) Ltd v. Commercial Union Assurance Co Ltd* [1987] E Vol. 1 Lloyd's Rep 194 on the point.

[22] I now turn to the claim for damages in the context of condition 10 of the insurance policy.

F **[23]** With regards to the claim actually made and the invoices tendered in support of the claim the defendant plead "*Dura lex sed ita scripta est*" which simply means if the assured shall make any claim knowing the same to be false or tainted with elements of fraud regards the amount exist or otherwise, the claim under the G policy becomes void and all claims there under shall be forfeited. Having read condition 4(c) and condition 10 of the said policy and having due regard to the evidence of the witnesses, I accept the submission of the defendant that condition 4(c) and condition 10 have been breached.

H **[24]** Therefore, based on all the evidence highlighted, I submit that the defendant has successfully proven the plaintiff's breach of condition 10, ie, an express contractual term, in using fabricated and consequently fraudulent documents in view of obtaining I benefits under the all risks policy. It is submitted that condition 10 has been made a condition precedent to any liability of the

defendant under the all risks policy and therefore, the plaintiff's breach of condition 10 automatically entitles the defendant to repudiate liability under the all risks policy. Therefore, the defendant submits that based on those grounds alone the plaintiff's claim ought to be dismissed with costs.

[25] In support, the defendant refers to the case of *Nsubuga v. Commercial Union Assurance Co Plc* [1998] 2 QBD 682 (TAB 13 DBOA); where Mr Justice Thomas quoted Mr Justice Mance's judgment in *insurance corporation of the Channel Islands Ltd v. McHugh and Royal Hotel Ltd* [1997] LRLR 94 with approval and held at p. 686 that:

> I agree with what Mr Justice Mance says; if there is fraud in relation to a claim, then the clause operates not merely in relation to the section of the policy in respect of which the fraud has occurred but to all sections of the policy, if there is fraud in relation to a claim, then that clause operates not merely in relation to the section of the policy in respect of which the fraud has occurred but to all sections of the policy. The position at common law can be summarized as follows:
>
> (1) A person who has made a fraudulent claim would not be permitted to recover at all ...
>
> (2) If a claim is fraudulently inflated so that the claim is made in an amount which the plaintiff clearly knows he has not suffered, that will amount to a fraudulent claim and will have the same effect ...

[26] Furthermore, in the case of *Baghbadrani v. Commercial Union Assurance Co Plc* [2002] Lloyd's Rep IR 94 (TAB 14 DBOA); it was decided *inter alia* by Judge Gibbs QC that an insured's duty to act in good faith continued even after the commencement of legal proceedings against an insured in that the insured was to abstain from making a fraudulent claim. The plaintiff operated a private Islamic college. The college premises were insured against material damage. The plaintiff was also covered under a business interruption policy for loss of profits. After a fire by unknown persons, the insurers indicated to the insured's solicitors that they were not denying liability under the policy and they duly appointed loss adjusters to negotiate the claim. In the meantime, the insurers appointed solicitors to look into the insured's claim to see if there were grounds for repudiating liability. The solicitors discovered that

A there were grounds to avoid the material damage policy because fraudulent invoices had been submitted by the insured, subsequently, the solicitors informed the insured that the insurers were repudiating liability under the business interruption policy on the grounds of fraud. The insured contended that insurers could B not raise these defences because they had entered into a binding compromise agreement and that the insurers had also elected to treat the claim as valid and thereby waived any breach of duty by the insured. It was decided by Judge Gibbs QC that there was no binding settlement between the parties even if there was such C a settlement, it was voidable owing to the fraudulent conduct of the insured. Judge Gibbs QC held in particular at p. 122 that:

> For example, fraudulently making a claim or fraudulently misleading the insurer. The duty to abstain from such fraudulent conduct does in my view survive the commencement of D proceedings.

[27] In the recent case of *Metro Gain Sdn Bhd v. Commerce Assurance Berhad* [2011] 1 LNS 1403; [2012] 9 MLJ 682, (TAB15 DBOA); it was decided by Gunalan Muniandy JC of the Johor E Bahru High Court that where a plaintiff submitted fraudulent and grossly exaggerated claims with a view of obtaining benefits under a policy of insurance, such fraudulent or exaggerated item of claim taints the entire claim and gives the insurer the right to repudiate liability. Gunalan Muniandy JC in his grounds of judgment held F *inter alia* as follows:

> [53] In this case, irrespective of whether the fire was accidental or caused by arson, there is, in my finding, clear evidence of the claim being dishonestly exaggerated by falsification of at least some of the documents tendered to support the claim. Falsification G or forgery, compared to fraud, has to be proved only on a balance of probabilities. P's act is in clear breach of condition 15 of the FMD policy and condition 12 of the FCL policy. Even if the court is wrong on this finding, P has breached condition 12 of the FMD Policy. I am compelled to hold that, as observance H of all the stipulated conditions, is a condition precedent for recovery by the insured under both policies, it was right and lawful for D to repudiate liability under both the policies.

[28] On the facts and surrounding circumstances when taken together with the compelling circumstantial evidence, this court I finds that the plaintiff's involvement in the setting up of the fire is

not without foundation and that fraudulent means or devices have been used by the plaintiff to obtain benefit under the said policy. Therefore, the defendant is entitled to repudiate its liability under the fire policy. As for the claim under the fire-consequential loss policy, this court finds that the claim is a grossly exaggerated claim together with non-existent claims, which disentitles the plaintiff to claim indemnity under the said policy. Accordingly, the defendant is also entitled to repudiate liability and discharge themselves under any legal obligations to satisfy the plaintiff's claim.

[29] It is settled law that a contract of insurance is one, where the parties to the contract are under duty to exercise the utmost good faith in matters relating to the said contract. Consequently, where the party to the contract of insurance acts *mala fide*, then, the innocent party, the defendant in the present case, is entitled in law to be discharged from the obligations under the contract. In the present case, the plaintiff has made a grossly exaggerated claim which is fraudulent in nature to defraud the defendant. On the facts and the surrounding circumstances of the present case, the plaintiff's entire claim is liable to be defeated as there has been, *inter alia*, failure to act in good faith. As stated, a contract of insurance is based upon good faith, and if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

[30] It is submitted that the effect of the insured submitting or utilising fraudulent devices or documents in support of its insurance claims are far-reaching. In *Baghbadrani*, (case referred to *supra*) the insured only submitted fraudulent documents in relation to the business interruption claim (and not the fire material damage claim) and the fire was found to have been caused by some unknown third party (and not the insured) but the court eventually dismissed the insured's claim under both policies due to the subsequent fraudulent conduct of the insured.

[31] Where a claimant inflates the amount of his claim there is a *prima facie* presumption that he is not acting in good faith and it is for the claimant to rebut the presumption if he is to succeed in its claim. In our present case I find the plaintiff has failed to rebut that presumption and therefore the plaintiff was not acting in good faith when making this claim and the claim should be dismissed. It is clear from the cases that in making a claim the insured ie, the

A plaintiff must exercise the utmost good faith and must avoid any attempt to exaggerate his claim. If an insured is unsure of his figures he should say so in order to avoid any allegation of fraud. I find as a fact having reviewed the evidence and the documents, there has been exaggeration of the plaintiff's claim in particular B reference to invoices (see Bundle B at p. 99-214).

[32] With regards to circumstances surrounding the plaintiff's loss, the plaintiff had ceased operating its business since 2006. Further, the statement of account of plaintiff (See p. 25 of Bundle B) also C show that the plaintiff was not in financial good health and was not making any income as it was yet to obtain the licence to operate his business. It is judgment of this court that the surrounding circumstances point to this claim being in breach of condition 10 of the policy. I refer to the text "*Law of Insurance*" D by Poh Chu Chai 6th edn. at pp. 910-911 where the learned Author sets out the approach to be adopted and I quote:

VI. FRAUDULENT CLAIMS

A. CIRCUMSTANCES SURROUNDING THE LOSS

E

In making a claim against an insurance company, an insured is expected to observe the utmost good faith. He is not allowed to put in a claim for an amount greater than what he had actually lost. If a claim is put in with the intention of defrauding the insurance company, for instance, by F exaggerating the amount claimed, then the whole claim is liable to be defeated on the ground that there has been a failure to exercise good faith. The exercise of good faith is fundamental to the relationship between the insurer and the insured. Whether a particular claim is tainted with a G fraudulent intent is largely a question of fact to be inferred from the surrounding circumstances. In *Central Bank of India Ltd. v. Guardian Assurance Co. Ltd.* The Privy Council, hearing an appeal from India, took into account the financial position of the insured, the circumstances of the fire together with what was left after the fire in coming to the H conclusion that the claim put forward by the insured was exaggerated and fraudulent. The respondents in this case were insurers and they insured goods belonging to a J. Rustomji who was the owner of a flour mill. The insured goods were pledged to the appellants, the Central Bank of I India. The goods, consisting of wheat, wheat products and gunny sacks, were kept in godowns, During the currency of the policy, a fire broke out at the godowns and the

insured goods were destroyed. The insured claimed that the godowns were full and the goods stacked right up to the ceiling of the godowns at the time of the fire. The insured contended that the claim was exaggerated and fraudulent. The trial judge, decided in favour of the bank. This decision was reversed by the High Court and the bank appealed to the Privy Council. In affirming the decision of the High Court, their Lordship decided that the claims were exaggerated and fraudulent. Lord Maugham said:

> The onus of proving a fraud was on the insurance company, ... [T] hat so far as the issue of fraud is involved in the case those who allege fraud ought to establish it by something more than grave suspicion, or, in other words, that the charge ought to be clearly established. ...There is other cogent evidence tending to show that all was not well with the mill and with the financial position of Seth Rustomji in the year 1926. ...The admitted fact that for some time before the fire the mills were working only six hours a day for a five-day week tends plainly to support the view that business had fallen off to a large extent, and adds weight to the suggestion that there was no reason why a mill proprietor in financial difficulty should keep so large an amount of capital locked up in godowns filled to the roofs so as to make convenient handling of the goods very difficult if not impossible. ... The indisputable facts as to the height of the debris in the godowns within a very short time of the discovery of the fire together with the evidence already mentioned, seem to their Lordships to establish the untruth of the statements as to the contents of the godowns given by the witnesses on behalf of the Plaintiffs, including Seth Rustomji himself,

[33] On the upshot and for all these reasons, I dismiss the plaintiff's claim with costs.